

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ERNEST JEROME WALLACE,

Defendant-Appellant.

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UNPUBLISHED

October 11, 2002

No. 232167

Genesee Circuit Court

LC No. 00-006291-FH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), for which he was sentenced as a fourth habitual offender, MCL 769.12, to 190 to 420 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues the complainant did not have sufficient independent basis to make a valid in-court identification of defendant, and counsel's failure to move to suppress the in-court identification constitutes ineffective assistance. We disagree.

Absent manifest injustice, a claim of unduly suggestive pretrial identification procedures will not be reviewed on appeal unless the defendant objected or moved the trial court to suppress the identification. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). Similarly, issues regarding the propriety of an in-court identification are waived absent objection. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

In the case at bar, the record does not support a finding of manifest injustice. Defendant did not move for suppression of his in-court identification, and the trial court was not obligated to determine whether an independent basis existed unless defendant asserted that his pretrial identification was tainted. *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988). Instead, counsel chose to collaterally attack the complainant's identification through cross-examination, arguing defendant's theory of misidentification and reasonable doubt. Moreover, the issue whether an independent source existed for an in-court identification arises where there is evidence that the lineup procedures used were suggestive. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Here, despite defendant's claims of suggestive procedures, the complainant did not identify defendant at the pretrial examination and a line-up was never held.

Alternatively, defendant also asserts that counsel's failure to move for a suppression hearing was ineffective assistance sufficient to deny him a fair trial. To establish ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

In this case, the complainant testified she saw defendant's face from about two feet away while illuminated by the hallway light. This was a sufficient independent basis; had counsel moved for suppression of the in-court identification, he would have been unsuccessful. Counsel may not be deemed ineffective for failing to bring a futile motion. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant has failed to overcome the strong presumption that counsel was effective. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant next argues that testimony indicating he was wanted on outstanding warrants was prejudicial because the jurors were left with other acts evidence that would invariably be considered as propensity evidence and counsel's failure to object or request a curative instruction was ineffective assistance. We disagree.

Defendant's claim alleging that the introduction of the challenged testimony resulted in a denial of his right to a fair trial presents an unpreserved constitutional issue. An unpreserved constitutional issue is subject to review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-766; 597 NW2d 130 (1999); *People v Watkins*, 247 Mich App 14, 28; 634 NW2d 370 (2001). To avoid forfeiture under the plain error rule, defendant must establish that: (1) error occurred, (2) the error was clear and obvious, and (3) the plain error affected the defendant's substantial rights by affecting the outcome of the lower court proceedings. *Carines, supra* at 764-766. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.*

Defendant has failed to meet his burden of establishing plain error because the fleeting reference to the outstanding warrants was part of the res gestae of the case and was essential to an understanding of why defendant was initially arrested. As this Court noted in *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), "the principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of such evidence." *Id.*, quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Accordingly, defendant failed to establish plain error affecting his substantial rights. *Carines, supra* at 763.

Likewise, counsel was not ineffective for failing to object to the fleeting reference to the outstanding warrants. On the record presented, the clear context of the comments allows the reasonable inference that the warrants referred to were traffic warrants. Moreover, counsel's failure to object to the introduction of the challenged testimony may be properly considered trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel may have chosen to forego objection in an attempt to understate the significance of the outstanding

warrants. Therefore, defendant has failed to rebut the strong presumption that counsel was effective. *LeBlanc, supra* at 578.

Defendant next argues that the trial court erred in failing to sua sponte give criminal jury instructions, CJI2d 4.1, 8.5, 7.8, or instruct on the theory of his defense. We disagree.

The trial court was required to instruct the jury in the applicable law and to fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Defendant's failure to object to the jury instructions waived error absent manifest injustice. MCL 768.29; *Carines, supra* at 764-765. Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Torres* (On Remand), 222 Mich App 411, 423; 564 NW2d 149 (1997).

Here, defendant suffered no manifest injustice. When reviewing claims of instructional error, we read the instructions as a whole rather than piecemeal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The jury instructions, when taken as a whole, fairly represented the issues to be tried and sufficiently protected defendant's rights. *Id.* Further, the instructions as a whole covered the substance of the omitted instructions. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). We presume the jury followed these instructions and, accordingly, defendant was not denied a fair trial. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). In the absence of error, defendant cannot demonstrate that counsel's performance was objectively unreasonable and so prejudicial that it denied him a fair trial. *People v Lee*, 243 Mich App 163, 185; 622 NW2d 71 (2000). There is no indication on the record that further instructions would have, with reasonable probability, been outcome determinative. *Id.*

Defendant's final challenge concerns his sentence, arguing that the trial court abused its discretion when it sentenced defendant not on the basis of the circumstances of the offense and the offender, but on improper considerations. We disagree.

Under the legislative guidelines, a sentencing court is required to impose a sentence within the calculated guidelines' range. MCL 769.34(2)(a) and (b). The judge's discretion to depart from the guidelines' range is limited to those circumstances and under those conditions sanctioned by the Legislature. *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). For crimes committed before January 1, 1999, the sentencing guidelines did not apply to habitual offenders. See MCL 769.34; *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000), after remand 250 Mich App 463; 648 NW2d 221 (2002) (*Babcock I & II*); *People v Hansford*, 454 Mich 320, 323; 562 NW2d 460 (1997). However, with the enactment of the new sentencing guidelines, the Legislature developed guidelines for habitual offender sentences by incorporating a prior record variable computation to reflect a defendant's habitual status and enhance his sentence. MCL 777.21. Thus, the clear language of MCL 769.34(10) is applicable to all offenders, habitual and non-habitual. Accordingly, absent substantial and compelling reasons for a departure, a sentence must be imposed within the guidelines range, and appellate review is limited by the act. MCL 769.34(2); MCL 769.34(3); MCL 769.34(10); MCL 769.34(11); *Babcock I, supra* at 73, 77-78.

Therefore, pursuant to MCL 769.34(10), defendant has failed to present a claim of error for this Court to review.

Likewise, this Court may not consider defendant's claim that the trial court did not individualize his sentence to the circumstances of the offense and the offender. MCL 769.34.

Finally, on the record presented, there is no support for defendant's position that the trial court based its sentence on improper considerations. The record indicates that the court's comments, when taken in context, were directed at defendant's continuing assertion of innocence, something the jury had already determined. Where there is no affirmative evidence that the sentencing court actually relied on improper considerations in imposing a sentence, this Court should not presume error merely because the court was aware of facts that were not properly considered. *People v Alexander*, 234 Mich App 665, 672-673; 599 NW2d 749 (1999). The better position is to presume that the trial court, similar to when sitting at a bench trial, knew the law and only considered the evidence properly before it. *Id.*

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter